In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
LEONARD T. RYAN,	)	
(Chapter 7 Case 97-42508)	)	Number 98-4205
	)	
Debtor	)	
	)	
	)	
WILEY A. WASDEN, III,	)	
Chapter 7 Trustee,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
PALMER & CAY PROPERTIES,	)	
PRUDENTIAL S.E. COASTAL	)	
PROPERTIES, PRUDENTIAL	)	
HILTON HEAD PROPERTIES,	)	
and CLARK HONNOLD	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

An involuntary petition was filed against Debtor Leonard T. Ryan under Chapter 7 of the Bankruptcy Code on August 25, 1997. Wiley A. Wasden, III, as Trustee, filed this action on September 29, 1998, seeking to avoid a preferential transfer and recover property of the estate. Defendants filed this Motion for Summary Judgment on April 15, 1999. Trustee opposes the motion, and an amicus curiae brief was filed on behalf of Defendants by the Georgia Association of Realtors. This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(F). Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, I make the

following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On January 25, 1996, Debtor and Judith Ryan entered into a brokerage agreement in which Debtor granted Ryan and Palmer & Cay Properties an exclusive right to sell Debtor's property, and also signed an addendum to the exclusivity agreement with Sotheby's. (collectively, "Listing Agreements"). The Listing Agreements engaged Sotheby's and Palmer & Cay Properties to sell the property located at 5 Breckinridge Lane, in Savannah, Georgia, at a listing price of $2,750,000.00. (Doc. 28, Ex. 1). The Listing Agreements' effective dates were January 15, 1996, to January 15, 1998. (Ex. 1).[1] In pertinent part, the Listing Agreements provided for the broker's commissions as follows:

> Seller [Mr. and Mrs. Ryan] agrees to pay to Broker a sales commission of 7% of the sales price or $ _____, at closing, in the event that during the terms of this agreement: (1) Broker procures a person ready, willing and able to purchase the property at the price described above . . . or (2) Seller enters into an enforceable contract for the sale of exchange of the property with any Buyer, without exclusion as to any Buyer, whether by or through the efforts of Broker or any other person, including Seller. Seller acknowledges and agrees that Broker may cooperate with another broker or compensate another broker, and that any commission hereunder may be dispersed or allocated in the sole discretion of Broker and may be allocated to other brokers who represent other parties to the transaction.

(Ex. 1). Palmer & Cay Properties enlisted the assistance of Prudential Southeast Properties and Prudential Hilton Head Properties in the marketing of the Debtor's property. In February 1997,

[1] All exhibits to which this Order refers are attached to Defendants' Motion for Summary Judgment, Document 28, unless otherwise noted.

Debtor reaffirmed the Listing Agreements and agreed to reduce the listing price. (Ex. 1).

On July 16, 1997, Marla Geffen signed a Residential Sales Contract for the purchase of the Debtor's property in the amount of $1,250,000.00. (Ex. 1). The Sales Contract provides that:

> Seller agrees to pay a total brokerage commission, at closing, based upon 7% of the total sales price. This contract has been made in cooperation with [Prudential Southeast] . . . who will receive a portion of the total brokerage commission as stated above, which is an amount equal to 3% of the total sales price.

(Ex. 1). Under the Sales Contract, the broker is made a party to the contract so as to allow it to enforce its right to the commission.

> Seller agrees to pay Broker the full commission when the sale is consummated. In the event that the sale is not consummated because of Seller's inability, failure or refusal to perform any of Seller's covenant's [*sic*] herein, then the Seller shall pay the full commission to Broker, and Broker at the option of Purchaser, shall return the earnest money to Purchaser, as herein provided. Purchaser agrees that if Purchaser fails or refuses to perform any of the Purchaser's covenants herein, Purchaser shall forthwith pay Broker the full commission.

(Ex. 1).

The sale was consummated on July 30, 1997, twenty-six days before the involuntary petition was filed against Debtor. Despite the language of the Listing Agreements and the Sales Contract, Defendants accepted commissions in the following amounts in order to facilitate the closing:

Palmer & Cay Properties	$ 4,000.00
Prudential Southeast Properties	$ 9,000.00
Prudential Hilton Head Properties	$ 28,000.00

(Exs. 1, 2). Defendant Clark Honnold, an associate broker employed by Prudential Southeast, avers that realtors sometimes accept commissions at lower rates than the contract provides in order to facilitate the closing on a property, especially where the closing price is more than $1,000,000.00. (Exs. 3,4). Honnold further contends that he has accepted lower commissions in approximately 25% of the closings in which he has been involved, accepting on those occasions commissions ranging from 1% to 6%. (Ex. 3). In conjunction with the closing, Debtor also deeded, by quitclaim deed, a 1985 Mercedes Benz to Honnold. Honnold contends that the Mercedes is a "grey market" automobile, which lessens its value and complicates its sale in the United States. (Ex. 3). Debtor listed the vehicle in his schedules with a value of $10,000.00. (Debtor's Sched. B).

CONCLUSIONS OF LAW

Under the Bankruptcy Code, a Chapter 7 Trustee may avoid certain preferential transfers.

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The burden of proving that a preferential transfer has taken place falls on the Trustee. 11 U.S.C. § 547(g). Once the Trustee has met this burden, the creditor may protect the transfer by proving one of two exceptions:

The trustee may not avoid under this section a transfer —

(1) to the extent that such transfer was —

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was —

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee;

(C) made according to ordinary business terms.

11 U.S.C. § 547(c).[2] The burden of proof to establish these exceptions falls on the creditor. 11 U.S.C. § 547(g).

I. Preferential Transfers

Defendants contend that the payment of a commission on the sale of Debtor's property does not constitute a preference under Section 547(a) because the debt did not arise until the time of closing; therefore, they argue, no antecedent debt existed as required by the Code. The Trustee contends that the obligation of the Debtor to pay the commission arose at the time the sales contract was signed and that when the commission was paid later, at closing, it was payment "on account of an antecedent debt."

Georgia law determines when a cause of action arises under a brokerage contract.

> The fact that property is placed in the hands of a broker to sell shall not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when, during the agency, he finds a purchaser who is ready, able, and willing to buy and who actually offers to buy on the terms stipulated by the owner.

O.C.G.A. § 10-6-32. I hold that, under the terms of the listing agreement, Debtor became obligated to pay a commission at the time that the sales contract was signed. *See* Northside Realty

[2] Other exceptions are enumerated under Section 547(c); however, only the first two exceptions are at issue in this case.

Associates, Inc. v. MPI Corp., 245 Ga. 321, 322, 265 S.E.2d 11, 12 (1980); *see also* Bryan v. Brown Childs Realty Comp., Inc., 236 Ga. App. 739,741, 513 S.E.2d 271, 273 (1999) (noting that Northside Realty was decided "based entirely upon application of the statutory language."). At that moment, Defendants satisfied the only condition precedent to their entitlement to a commission. The fact that the commission was not payable until the time of closing is irrelevant in this case. Although a broker can waive its statutory accrual of a right to commissions, that did not occur here.

> If the owner of property desires to limit his liability for commissions in a manner other than that which is governed by the general rule, such as that commissions will be due only in the event of a consummated sale, provision for such limitation of liability must be embodied in the authority to sell.

Hall v. Vandiver, 37 Ga. App. 656, 141 S.E. 332, 335 (1928). A provision for payment of commissions at closing does not establish that Defendants waived their right to commission upon producing a buyer - rather it sets the time for payment. *See* Wehunt v. Babb, 84 Ga. App. 536, 539, 66 S.E.2d 405, 407 (1951) (contract to "negotiate the sale" did not require actual sale in order to earn commission; contract "was unquestionably a brokerage contract. It contained no condition that the commission was to be paid *only* upon the consummation of the sale.") (emphasis added).

Defendants argue that because the time for payment of the commission came later than the date on which the commission was earned, the debt did not truly exist until closing and therefore is not an antecedent debt. Defendants' argument is a bit incredible, and fails to

distinguish between the existence of an obligation and its due date.[3] The Eleventh Circuit, when faced with a similar argument that payments of debts which were co-signed by the debtor were not preferential because the guarantee obligation had not 'matured' at the time, stated succinctly:

> This contention is frivolous. It is established that "debt" is to be given a broad and expansive reading for purposes of the Bankruptcy Code, and that when a creditor has a claim against a debtor — even if the claim is unliquidated, unfixed, or contingent — the debtor has incurred a debt to the creditor.

In re Chase & Sanborn Corp., 904 F.2d 588, 595 (11th Cir. 1990) (internal citations omitted). Moreover, Defendants cannot now claim that the closing on the sale was a condition precedent to the obligation to pay this debt, because they very clearly reserved the right to a commission upon the *procurement* of "a person ready, willing and able to purchase the property," (Defs.' Ex. 1, ¶ 4-8, Ex. A.), and could collect the commission from either buyer or seller if the sale were not consummated due to that party's fault. (Defs. Ex. 1, ¶ 8-10, Ex. C).

II. Preference Defenses

The exceptions found in Section 547(c) operate as affirmative defenses, for which the creditor bears the burden of proving each element. In re A.W. & Associates, Inc., 136 F.3d 1439 (11th Cir. 1998); 11 U.S.C. § 547(g). I find that Defendants failed to meet this burden and are not entitled to summary judgment.

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[3] To accept Defendants argument would render countless other forms of preferential transfers legitimate, contrary to the section's obvious purpose of equitable distribution among creditors. For example, a debtor might pay off an entire credit card balance, when only a *de minimis* monthly payment was actually due. Defendants' theory would remove the payment of the entire balance from the preference statute, simply because the debt was not technically "due and payable."

A. Contemporaneous Exchange for New Value

Under Section 547(c)(1), Defendants bear the burden of proving that (1) the parties intended for the exchange to be new services and (2) that the exchange was substantially contemporaneous. The Bankruptcy Code defines "new value:"

> money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation.

11 U.S.C. § 547(a)(2). The new value given must be concrete and specific, as opposed to hypothetical or ephemeral. *See* In re Jet Florida Systems, Inc., 861 F.2d 1555, 1559 (11th Cir. 1988). Moreover, the creditor bears the burden of proving that portion of the transfer which was a contemporaneous exchange for new value. Id. Only that portion of the transfer is excepted from the voidable preference. Id.

Defendants argue that the "new value" given to Debtors here was composed of both services rendered in selling the property and in attending the closing. None of the affidavits submitted by Defendants, however, establish that any part of the commission was earned only if services were rendered after the contract was procured, or the value of such services.

> A court must measure the value given to the creditor and the value given to the debtor in determining the extent towhich the trustee may void a contemporaneous exchange. . . . [A] creditor must prove with specificity the new value given to the debtor.
>
> Furthermore, the applicable statutory definition of "new

> value" that Congress provided in section 547(c)(2) expressly requires that the creditor prove the specific valuation of the "new value." . . . This language necessarily requires a specific dollar valuation of the "new value" – the "money's worth" — that the debtor received in the exchange.

In re Jet Florida Systems, 861 F.2d at 1558-1559. Defendants have produced no credible evidence of the specific monetary value of services rendered at the closing, and therefore fail to meet their burden on this exception.

B. Ordinary Course of Business

Under Section 547(c)(2), Defendants must prove three elements: (1) that the payment was made in the ordinary course of the debtor's financial affairs; (2) that the payment was in the ordinary course of dealing between the creditor and the debtor; and (3) that the payment was made according to ordinary business terms. Resolution of this exception "turns on the specific events surrounding [Debtor's] payments to [the creditor]." In re Craig Oil, 785 F.2d 1563, 1565 (11th Cir. 1986). Because I find that the manner of payment of the commission in this case raises a genuine issue of material fact as to the third element, I need not address the first two.

The determination of what constitutes "ordinary business terms" with respect to a given transaction requires an examination of industry standards. A.W. Assoc., 136 F.3d at 1442.

> "[O]rdinary business terms" refers to the range of terms that encompasses the practices in which firms similar in some general way to the creditor engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C.

Id. at 1443 (quoting In re Tolona Pizza Prods. Corp., 3 F.3d 1029, 1033 (7th Cir. 1993)). Industry standards, however, are not a "litmus test by which the legitimacy of a transfer is adjudged, but function as a general backdrop against which the specific transaction at issue is evaluated." A.W. Assoc., 136 F.3d at 1443. The range of deviation from the normal business standard is directly related to the history between the parties and the extent to which their business relationship is cemented. Id. (citing In re Molded Acoustical Prods., Inc., 18 F.3d 217, 225-26 (3d Cir. 1994)).

Defendants' burden on summary judgment is to show that no genuine issue of material fact exists with respect to the deviations from normal business practice. This burden is to be contrasted with Defendants' burden at trial, which is to show only by a preponderance of the evidence that the deviations remained within the range of ordinary business terms. Defendants' affidavits establish that it is not uncommon for a commission of less than the contractual 7% to be accepted in order to facilitate closings, especially in the case of high value transactions. However, the Trustee's affidavits establish that it is uncommon for such a commission reduction to come after execution of the sales contract. (Doc. 33, Exs. A-C). The Trustee's affidavits further establish that transfer of an automobile in partial satisfaction of a commission is not according to "ordinary business terms." (Doc. 33, Exs. B & C). The Trustee has produced affidavits which raise a genuine issue of material fact as to the terms of the exchange. Because Defendants fail to meet their burden of showing that no genuine issue of material fact exists, they are not entitled to summary judgment.[4]

[4] Defendants argue that it is relevant to consider that any deviation in terms served only to reduce the commission and thus increased the disbursements to non-realtor parties to the closing. Accepting that to be true in this case, however, the test is not one of balancing the equities of a transaction generally, or comparing it to the projected cost of a Title 11 sale, but rather whether the payee (defendants) received more than they would have in a Chapter 7, absent the preferential payment.

O R D E R

In consideration of the foregoing, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment is DENIED. The clerk is directed to set this matter on the calendar for a formal pre-trial conference.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1999.